Law of Torts – The Invisible Hand in Civil Law

(Relevant to PBE Paper IV – Business Law and Taxation)

Edward B W Tong, Chartered Company Secretary, Barrister at Law

Introduction

There are two branches of law in our legal system: Criminal law deals with public vices and civil law governs individuals' disputes. Most civil disputes relate to a group of several connected people. Such disputes may include a contractual dispute between a seller and a buyer, or a problem arising among a group of shareholders in a company. In these cases, the parties are somehow related, and are willing to abide by a legal relationship voluntarily. In contrast, a tort is a civil wrong actionable by the injured party. The victim can sue any wrongdoer with or without having a relationship with him or her. Therefore, tort law permeates all aspects of our daily lives. This article will discuss the meaning of tort law and its various features in the PBE Paper IV exam.

Definition

Tort law governs the relationship between different individuals. Specifically, it concerns the private rights and liabilities of two persons, where tort provides remedies to a victim who has suffered from a civil wrong. Tort law is a major component in the syllabus of the PBE Paper IV exam, and questions related to this topic frequently appear in the exam papers. For the sake of the examination, there are two main areas of concern: Firstly, candidates should understand the meaning of negligence, and the necessary requirements for its establishment. Secondly, there are certain individual concepts in tort (each related to a specific scenario) that candidates should also be familiar with.

Legal Liability

A tort is a civil wrong. In simple English, this usually refers to some form of negligence committed by an individual (in contrast to an intentional act, which is more likely to be criminal). However, not every single act of negligence shall require that the negligent individual be held liable. Therefore, the very question to ask is what elements must exist for a case of negligence to become actionable. The law has established that an action for negligence shall only become possible if the following four elements exist:

1. The defendant owed a duty of care to the plaintiff.
2. The defendant was in breach of the duty.
3. The damage was caused by said breach of duty.
4. The plaintiff suffered damages.

Candidates have always been required to answer questions related to negligence in

past examinations. Usually, there are two types of questions concerning negligence. Firstly, candidates are required to explain this legal concept and to support their explanation with authorities. This type of question is purely narrative in nature and no application is needed. Alternatively, a candidate may instead be given a scenario, and then be required to identify the issues and apply the laws to the facts.

For the first type of question, candidates have to define the meaning of negligence and list out all four elements in establishing a legal liability. This kind of question may appear to be straightforward, because application is not required, and candidates' performance will be directly related to their familiarity with the law. Nevertheless, candidates should read the question carefully, because even for a narrative question, the focus may still be different. For example, candidates may be required to thoroughly explain the four elements. This means providing a full illustration of the relevant laws. On the other hand, candidates may only be required to answer a question related to a specific part of the law or merely to discuss a particular case. A notable example is the case of *Donoghue v Stevenson* (1932). Candidates may also be required simply to discuss a specific case and its implications. Alternatively, candidates may, for example, be required to explain the essential elements of neighbourhood (a concept in duty of care) or the differences between causation in fact and causation in law. Candidates must be very cautious in understanding exactly what the question is asking.

For the second type of question, candidates will be required to identify a problem or a legal issue from a scenario and then to give a suggestion or solution. In such questions the emphasis will usually be on a candidate's ability to identify a hidden problem, so it would be extremely rare that a candidate would have to explain or to state all of the legal points related to negligence. Instead, candidates should think of the relationship between the parties (duty of care), the negligent act (breach of duty) and the background of the incident (causation). Undoubtedly, all of these elements would typically be relevant in resolving a problem of negligence. It may be fine to go through each of these aspects whenever necessary, but candidates are advised to focus on certain specific areas of the law in a fact-based problem.

Specific Concepts in the Law of Torts

Apart from the main principles, candidates should also pay attention to certain special scenarios (concepts) in tort. These include but are not limited to the thin skull rule, res ipsa loquitur, contributory negligence, pure economic loss and vicarious liability. These concepts concern some special problems in tort where liability cannot be easily resolved by the main principles alone. Candidates are usually required to either define a special term and to quote relevant authorities in supporting their answers, or they will be required to identify a legal issue from a given scenario.

The most notable mistake made in this kind of question is that candidates fail to realize the very nature of the question, because the issues in this kind of question are usually less obvious and sometimes even misleading. This is simply because the given scenarios are very similar to those in other topics, such as company law or employment law, and thus candidates may fail to spot their relevance with tort.
The characteristics of each special scenario (concept) are as follows:

The thin skull rule (egg skull rule) — This is a special rule in tort, stating that the court will not consider the weakness or infirmities of the plaintiff or his or her property. The problem for most candidates is simply that they do not understand the meaning of the rule at all. In fact, this rule is straightforward and relatively easy to spot. Candidates can score good marks most of the time if they can merely recall its meaning.

Res ipsa loquitur — This is a doctrine that refers to an attempt to infer negligence from the very nature of an accident or injury in the absence of direct evidence provided by the defendant. The importance of this doctrine is that an accident must usually satisfy the necessary elements of negligence: duty, breach of duty, causation, and injury. This means that each element must be separately proved. In res ipsa loquitur, the elements of duty of care, breach and causation are inferred from an injury that does not ordinarily occur without negligence (i.e. no strict proof is required). Candidates may be required simply to explain this concept or may be required to apply it to prove the defendant's liability in view of weak or a lack of supporting evidence.

Contributory negligence — This doctrine refers to the situation in which the injury suffered by the plaintiff was caused jointly by the plaintiff himself. This means that the plaintiff's fault, which contributed to his own injury, must be taken into account in calculating the damages to be awarded. Again, candidates may be required to explain this concept alone or to solve a problem arising from it. The most common problem is that this concept can be easily mixed up with other similar rules or doctrines. For example, candidates often confuse contributory negligence with employment law. Candidates should be very careful not to adopt this doctrine casually whenever they see that two parties are involved in a case.

Pure economic loss — This refers to the financial losses suffered as a result of the negligent act of the defendant, which is not accompanied by any actual or physical damage. This doctrine illustrates the distinction between pure economic loss and consequential economic loss, where the former is highly controversial. Pure economic loss was not recoverable in negligence until the decision in *Hedley Byrne & Co Ltd v Heller & Partners Ltd [1964] AC 465*. Before that, pure economic loss was thought to be irrecoverable. Following the Hedley case, it became possible to recover pure economic loss in cases of negligence; however, the party seeking to be compensated for such loss must demonstrate to the court with a compelling reason. Candidates should be very careful in differentiating pure economic loss (limited and controversial) from consequential economic loss (usually acceptable), and to apply this doctrine only in an obviously justifiable situation.

Vicarious liability — This means that an employer is liable for a tort committed by his or her employee if the latter commits the tort in the course of employment. This principle generally includes (i) a wrongful act authorized by the employer; or (ii) an authorized act done in an unauthorized manner. The concept is not difficult to grasp, but similar to the situation with contributory negligence, it can be easily mixed up with employment law. This is understandable, given that this concept is indeed related to employment. Candidates must be very careful to look for hints and information to help them discern between the two. In general, a question on employment law tends to

focus on the protection afforded to the employees, while a question on tort will more likely be related to the degree and extent of liability.